85-541

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 501(c) of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"], provides for federal preemption of state finance charge rate limitations otherwise applicable to mobile home financing contracts if the terms and conditions relating to the transaction comply with certain regulations, including 12 C.F.R. § 590.4(h), promulgated thereunder by the Federal Home Loan Bank Board [hereinafter the "FHLBB" and the "Board"]. This case presents the following issues:

(1) Whether the Eleventh Circuit majority's refusal to accord controlling weight to the FHLBB's interpretation of 12 C.F.R. § 590.4(h), as expressed in an opinion letter from its general counsel and in two *amicus curiae* briefs filed by the Board in this case, and to the FHLBB's conclusion that the Quillers' contract does not violate § 590.4(h) runs afoul of this Court's mandate in *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790 (1980), that the courts should consider an agency's interpretation of its own regulations dispositive unless "demonstrably irrational"?

(2) Whether the mere presence in a manufactured home sales contract of a provision allowing acceleration or repossession after default "without notice, subject to any notice of right to cure" violates 12 C.F.R. § 590.4(h) and results in loss of federal preemption for the entire contract, where § 590.4(h) only prohibits the creditor from taking "action to repossess. . . until 30 days after the creditor sends the debtor a notice of default in the form set forth in [§ 590.4(h)(2)]," absent an allegation that any such action was actually taken by the creditor without the required notice?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the July 8, 1985, *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinions Below

The *en banc* opinion of the Court of Appeals (Appendix A)[2] is not yet reported. The panel opinion of the Court of Appeals is reported at 727 F.2d 1067 (Appendix B). There was no formal opinion of the District Court. The unre-

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1. Petitioner's parent corporations in reverse order are BarclaysAmericanCorporation, Barclays U.S. Holdings Inc., Barclays USA Inc., Barclays Bank PLC and Barclays PLC. Petitioner's successor by merger is BarclaysAmerican/Financial, Inc.

2. The Appendix to this Petition is filed as a separate document. Citations to portions of a particular appendix will be as follows: "App. ___ at ___."

ported Order of the District Court dismissing Respondent's complaint is reproduced as Appendix C.

Jurisdiction

The *en banc* opinion of the Court of Appeals was entered on July 8, 1985. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions And Regulations Involved

Section 501 of the Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA" and "the Federal Preemption Statute"] and 12 C.F.R. § 590.4(h) appear in their entirety in the Appendix as Appendices G and H. The portions thereof most directly applicable to this Petition are set forth here.

DIDMCA § 501(a), 12 U.S.C. § 1735f-7 note [hereinafter "DIDMCA § ____"].

> Sec. 501. (a)(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by . . . a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; . . . .

DIDMCA § 501(c).

> (c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations

prescribed by the Federal Home Loan Bank Board. Such regulations shall—

* * *

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);. . . .

DIDMCA § 501(f).

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

12 C.F.R. § 590.4(h) [hereinafter "§590.4(h)"].

(h) *Notice before repossession, foreclosure, or acceleration.* (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as decribed above. The debtor is not entitled to notice of default more than twice in any one year period.

Statement Of The Case

On June 27, 1981, the Quillers purchased a new 1981 Liberty Mobile Home from Vintage Enterprises, Inc., pursuant to a retail installment contract [the "Quiller Contract"] (Appendix I). The Quiller Contract was subsequently assigned to BarclaysAmerican/Credit, Inc. The amount fi-

nanced under the contract was $16,000.00, the term of the contract was 180 months, the total finance charge was $31,417.40, and the annual percentage rate was 18.5%. The form contract used for the transaction indicated, in the lower left-hand corner of the front and back page thereof, that it was a "FEDERAL PREEMPTION CONTRACT."

On March 2, 1983, the Quillers filed a class action complaint (Appendix M) in the Superior Court of Richmond County, Georgia, alleging that the finance charge on the Quiller Contract exceeded the rate authorized by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 *et seq.* [hereinafter the "GMVSFA"] and that the overcharge was wilful. They affirmatively alleged that DIDMCA did not preempt the rate restrictions of the GMVSFA because their contract did not contain a disclosure of their right to a notice of default and a right to cure thirty days prior to any action by the creditor to accelerate, repossess or foreclose as allegedly required by 12 C.F.R. § 590.4(h) [hereinafter "the 30-day notice"]. Because of this alleged loss of preempt status, they seek, on behalf of themselves and the class members, the forfeiture of the entire finance charge and an affirmative penalty of twice the finance charge for wilful violation. O.C.G.A. § 10-1-38. As regards the Quiller Contract alone, the forfeiture would be $31,417.40 and the penalty $62,834.80, for a total loss of $94,252.20.

BarclaysAmerican removed the case to the United States District Court for the Southern District of Georgia (Augusta Division) on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and moved to dismiss under F.R.C.P. 12(b)(6) on the ground that DIDMCA preempted the GMVSFA rate provisions. On June 14, 1983, the District Judge granted the motion (Appendix C). On the same day, the District Judge also dismissed the companion case of *Grant et al. v. G.E.C.C.*, Civil Action No. CV183-96 (Appendix F) [hereinafter "*Grant*"], which involved basically the same allegations. Both the Quillers and the Grants appealed and the cases were consolidated for argument.

The Quiller Contract provides that, upon default,

> the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable. . . .Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, without notice or demand for performance or legal process, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it.
>
> App. I at I3 (*emphasis added*).

The mobile home retail installment contract involved in *Grant* [the "Grant Contract"] contains the following provision:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder. . . *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.*
>
> App. D at D3 (*emphasis added*).

DIDMCA conditions preemption for mobile home transactions upon compliance by the creditor "with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board." DIDMCA § 501(c). § 590.4(h) provides in pertinent part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section.
>
> 12 C.F.R. § 590.4(h).

On October 28, 1982, the FHLBB's general counsel, Thomas P. Vartanian, issued an informal opinion, 5 Fed. Banking L. Rep. ¶ 83,027 (1983) (Appendix J) [hereinafter

the "Vartanian Letter"] stating that § 590.4(h) "refers only to the act of giving notice" and does not require "that a covered credit agreement recite the purchaser-borrower's right to notice."

The FHLBB filed an *amicus curiae* brief,[3] Appendix K, before the three judge panel and adopted the views set forth in the Vartanian Letter, going on to state:

> Because plaintiff-appellants' arguments are directly inconsistent with the opinions of the Board's General Counsel and with the Board's intent, this Court should reject plaintiff-appellants' arguments and uphold the district court's dismissal of these suits on these two issues.
>
> App. K at K12.

In a 2-1 decision, Judge Kravitch, speaking first for the entire panel, held that neither DIDMCA nor § 590.4(h) requires any mention in the sales contract of the debtor's right to the 30-day notice. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067, 1070 (11th Cir. 1984) [hereinafter "*Quiller I*"], App. B at B5. Then, the panel split, the majority going on to hold that, since the contract contained a provision which it construed as allowing BarclaysAmerican to accelerate the indebtedness and repossess the collateral without notice, the contract "authoriz[ed] conduct *contrary* to the [preemption] statute or regulations" and therefore did not qualify for preemption. 727 F.2d at 1072, App. B at B7 (emphasis original). This conclusion was based on the newly postulated rule of construction that the court

> should examine the contract *through the eyes of the typical consumer* and determine whether the lender

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3. Other *amicae* in the appeal were: the United States League of Savings Institutions; The Consumer Bankers Association; the American Financial Services Association; the American Bankers Association; the Coordinating Counsel on Manufactured Housing Finance; the Georgia Legal Services Program, Inc.; The Housing Advocates, Inc. and the Ohio Mobile Home Owners' Network.

> could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights.
>
> 727 F.2d at 1071, App. B at B7 (emphasis added).

Judge Roney dissented to the second holding, stating that he would simply invalidate the offending clause and enjoin its enforcement if necessary to protect the consumer. 727 F.2d at 1072-73, App. B at B9-B10. Based upon *Quiller I*, the Grant Contract was also found to have lost its preempt status, Judge Roney again dissenting. *Grant et al. v. G.E.C.C.*, 727 F.2d 1073 (11th Cir. 1984) [hereinafter "*Grant I*"], Appendix E.

The Eleventh Circuit granted rehearing *en banc* with oral argument in both cases. The FHLBB filed a second *amicus* brief, Appendix L, stating in strong terms its disagreement with the *Quiller I* and *Grant I* opinions. On July 8, 1985, the court in *Quiller* affirmed and reinstated the panel majority's opinion in a closely split (6-5) decision in which two written dissents were filed. *Quiller et al. v. BarclaysAmerican/Credit, Inc.*, ____ F.2d _____, Case No. 83-8455 (11th Cir. July 8, 1985) (*per curiam*) [hereinafter "*Quiller II*"], Appendix A. On that same day the court, in an 8-3 decision, reversed the panel majority's original decision in *Grant* and concluded that the language in the Grant Contract was sufficiently different from the language in the Quiller Contract to mandate a contrary result. *Grant et al. v. G.E.C.C.*, ____ F.2d _____, Case No. 83-8456 (11th Cir. July 8, 1985) (*per curiam*) [hereinafter "*Grant II*"], Appendix D.

REASONS FOR GRANTING THE WRIT

I. Introduction

This case is one of seven class actions brought against five different creditors involving a number of common issues of law and fact, including the principal issue involved

in this Petition[4]. The potential *ad damnum* in the pending cases is in the hundreds of millions of dollars. In *Quiller* and *Grant*, the first two of the cases to reach decision, the Eleventh Circuit has interpreted the FHLBB's regulation in a manner totally at odds with the Board's interpretation, as specifically expressed to the court in two *amicus* briefs, thus resulting in loss of federal preemption and subjecting Petitioner and other creditors to the imposition of enormous state law penalties. Two vigorous dissents revealed a sharp and fundamental philosophical split among the court's members, one of the dissenters noting his fear "that the [majority's] treatment of this preemption loan agreement forecasts an excursion into hypertechnical 'gamesmanship' similar to that apparent in litigation under the Truth-In-Lending Act" and expressing his "hope that we do not travel down that road again in connection with this very useful law." *Quiller II*, *supra*, slip op. at 4803, App. A at A8 (Hill, J., dissenting). By thus converting a regulation designed to regulate only conduct into a Truth-In-Lending type disclosure regulation, the decision below has opened the door nationwide to a flood of litigation in which the acceleration, repossession and foreclosure provisions of every DIDMCA mobile home contract will have to be examined

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4. One of the attorneys who represents Respondent in this case, John B. Long, Esq., is co-counsel for the class in each of the other six cases, which are:

Grant, *supra*;

Moyer et al. v. Citicorp Homeowners, Inc. et al, Case No. 84-8166, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Fort Wayne Mortgage Company v. Wood, Case No. 85-8297, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Southern Guaranty Corporation v. Doyle et al., Case No. 85-8187, Eleventh Circuit Court of Appeals (on interlocutory appeal);

Bass et al. v. Barclays American/Financial, Inc., Case No. 85 CVS 811 in the General Court of Justice, Superior Court Division of North Carolina;

Crow v. Citicorp Acceptance Co., Inc., Case No. 85 CVS 2805 in the General Court of Justice, Superior Court Division of North Carolina (on interlocutory appeal to the North Carolina Court of Appeals).

on a case-by-case basis for compliance with § 590.4(h), and it has introduced a great element of doubt in the minds of creditors as to the FHLBB's authority and ability to issue opinions and interpretations of the DIDMCA regulations upon which creditors may rely, thus making compliance with the Board's regulations problematical and highly risky for creditors.

By the late 1970's, the cost to lenders of funds had risen above the usury limits of many states, thus drying up the flow of mortgage money to the housing industry. DIDMCA was presented to Congress to counter that effect. Hearing on S. 1988 before the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 1st Sess. (1979) (Statement of Governors of the Federal Reserve System). Senator Proxmire, in presenting DIDMCA,[5] noted that usury limits had outlived their usefullness in the existing lending climate and that

> [t]he home-building industry is particularly disadvantaged by usury limits. . . The impact will be most severely felt by younger, lower-income prospective homeowners.
>
> Usury Lending Limits: Hearing on S. 1988 before the Comm. on Banking, Housing, and Urban Affairs, 96th Cong. 1st Sess. (1970) (Opening Statement of Chairman William Proxmire).

Thus DIDMCA's legislative history makes it clear that the principal and overriding purpose of § 501 of DIDMCA was to reestablish the flow of private funds back into the housing industry. The consequence of the decision below will be to frustrate, not further, that purpose.

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5. DIDMCA was only one part of an almost simultaneous three-pronged program to deregulate financing rates. Rates for Veteran's Administration transactions were deregulated by 38 U.S.C. § 1828, effective November 28, 1979, and FHA rates were deregulated by 12 U.S.C. § 1735f-7, effective December 21, 1975. The predecessor to DIDMCA, Pub. Law 96-161 (which contained a 90-day sunset provision) was effective December 28, 1979, and was replaced by DIDMCA on March 31, 1980.

As a case of first impression construing a federal statute and regulation, this case is of nationwide and immediate impact and importance to mobile home creditors affected by DIDMCA.[6] The majority opinion fails to follow recognized principles of law and is clearly in error. Even more important, the court's refusal to follow the FHLBB's interpretation of § 590.4(h) runs afoul of this Court's clear mandate that the courts should give controlling weight to an agency's interpretation of its own regulation unless "demonstrably irrational," *Ford Motor Credit Corporation v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790 (1980) ["Milhollin"], and creates doubt among creditors trying to comply with the Board's regulations. That refusal, taken together with the closeness of the court's decision and the vehemence of the dissents, the amount of money involved and the potentially ruinous impact of the decision, the existence of a number of other similar pending cases, and the potential that the decision below will generate a flood of litigation nationwide (two of the other pending cases are in state court in North Carolina), make it especially appropriate that this Court grant certiorari and decide this important question of federal law at this time.[7]

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6. Manufactured housing is one of the few forms of home ownership available to low-income families. *See The Report of the President's Commission on Housing*, 1982, p. 85. Of the approximately 845,000 new manufactured homes sold nationwide during the period between 1980 and mid 1983, approximately 68% — or about 574,477 — were conventionally financed, mostly by banks, savings and loan associations and consumer finance organizations. U.S. Department of Commerce, Construction and Housing Starts Report C 20-83-6, June 1983; Appendix, p. v, to Brief of the Coordinating Council on Manufactured Housing Finance as Amicus Curiae, filed in this case. The total estimated finance charges for those manufactured homes is $13,265,690.00. *Id.*, p. ix. Even if only a relatively small percentage of that total is affected by the decision below, the impact in absolute dollar figures would be tremendous and potentially debilitating to the mobile home industry.

7. Also worthy of mention is that, if *Quiller I* is allowed to stand, the Supreme Court of North Carolina will almost certainly be put, in the very near future, in the position of choosing between the Eleventh Cir-

The issue presented is ripe for review at this time under the standards postulated by this Court in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200-01, 103 S. Ct. 1716, 1720 (1983). First, the issue is "[fit] for judicial decision" as it is "predominantly legal," *id.*, requiring only the construction of a short regulation. More importantly, the "hardship to the parties of withholding court consideration," *id.*, is great, as the Eleventh Circuit has refused to defer to the FHLBB's views, the monetary consequences are tremendous and Petitioner has nowhere else to turn. Finally, the comity considerations involved in supervising the balance between federal and state power under the Supremacy Clause are peculiarly appropriate for this Court's consideration, and this Court has often granted certiorari to consider decisions of the courts of appeals involving federal preemption issues, even in the absence of a conflict among the circuits. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305 (1977), *reh'g denied*, 431 U.S. 925, 975 S. Ct. 2201 (1977) (certiorari granted to decide whether California food weight regulations preempted by Federal Food, Drug and Cosmetic Act); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979) (California's community property law preempted by the federal Railroad Retirement Act of 1974); *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, *supra*, (certiorari granted to decide whether Atomic Energy Act preempts § 25524.1(b) of the California Public Resources Code).

Thus, the subject matter and nature of the case, and the existence of a clear conflict between the Eleventh Circuit majority and the FHLBB as to the interpretation of § 590.4(h) make it important that such conflict be resolved by this Court at this time.

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cuit's position as expressed in *Quiller I* and the position of the Board as expressed in the Vartanian Letter and in the briefs filed by the Board.

II. The Eleventh Circuit's 6-5 Decision Is In Conflict With The Federal Home Loan Bank Board's Interpretation Of Its Own Regulation And Is Therefore In Violation Of This Court's Mandate in *Milhollin v. Ford Motor Credit Company*, 444 U.S. 555 (1980)

A. The Eleventh Circuit Majority's Position.

The sole reason alleged by Respondents to have deprived the Quiller Contract of preempt status under DIDMCA was that BarclaysAmerican violated § 590.4(h) by not disclosing in the contract the right to the 30-day notice. App. M at M3. Having unanimously rejected that allegation, the panel then split 2-1, the majority holding that

> [a]lthough federal law does not mandate a contractual notice provision, the creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations. While there is no affirmative duty to disclose to the debtor his statutory right to notice before repossession or foreclosure, if the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.
>
> *Quiller I*, App. B at B7. (emphasis original).

The court cited no federal case in point as authority for making the quantum leap necessary to construe a statute and regulation regulating only conduct to have been violated by the mere presence in a contract of a provision which arguably might authorize the proscribed conduct.

Having established its rule of law, the majority went on to set up the test by which presumably every mobile home provision in the United States would be judged:

> Because purchasers of mobile homes frequently are unaware of complicated rules of contract constuction, we should examine the contract *through the eyes of the*

> *typical consumer* and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights.
>
> *Id.*, App. B at B7 (emphasis added).

The majority then looked at the allegedly offending contract provision and concluded that, when measured against its new-found standard, "[t]hese provisions are inaccurate statements of the creditor's rights under federal law." *Id.* at 1072, App. B at B8. With regard to the qualification, contained in the contract, that the creditor's default rights were "subject to any notice of right to cure," the majority responded that "[u]nless the debtor has acquired knowledge of his statutory right to cure from some outside source, however, this language will not accurately notify him of his contractual rights." *Id.*, App. B at B8. In its perhaps most startling statement of all, the majority went on to say that the "subject to" qualification would at most inform the debtor that he might have a right of cure, "but the law guarantees him an *absolute* right to cure," *id.*, App. B at B8 (emphasis original), thus resulting in the consumer having been given "an affirmative misrepresentation as to his statutory guarantees."

Finally, in response to BarclaysAmerican's argument that § 590.4(h) could not possibly be violated without some action having been taken to accelerate, foreclose or repossess without proper notice, the majority stated:

> But when the contract affirmatively allows the creditor to foreclose, repossess or accelerate payment immediately upon default, subject to an undefined, potential right to cure, the "terms and conditions" relating to the loan agreement do not comply with the regulations or the statute. . . [and] the Quiller contract does not qualify for protection under the preemption statute.
>
> *Id.*, App. B at B9.

As has already been noted, a 6-5 majority of the *en banc* court, *per curiam*, reaffirmed and reinstated the panel opinion upon rehearing without further substantive comment.

B. The Federal Home Loan Bank Board's Contrary Position, As Expressed To The Eleventh Circuit In *Quiller*.

The Vartanian Letter specifically stated that "[t]his requirement [of § 590.4(h)] refers only to the act of giving notice." On rehearing *en banc*, the Board filed a second *amicus* brief, stating:

> The Board has an interest in this litigation because it is authorized under the Act to publish interpretations governing its implementation, 12 U.S.C. § 1735f-7 note(f), and because the Board desires that judicial construction of Board regulations be consistent with the agency's intent in adopting the regulations. *This is of particular importance in these cases where the panel has written opinions that, while purporting to defer to the Board's interpretation of its regulations, reach a result that is not consonant with the statute or regulations.*
>
> App. L at L8-L9 (emphasis added).

The Board disagreed with the panel majority's position in the second part of *Quiller I* that the rights of immediate acceleration and default contained in the contract violated § 590.4(h), saying that those rights were "not necessarily contrary to the Act and the implementing regulation" because both DIDMCA and § 590.4(h) specifically provide for "circumstances in which a creditor may in fact accelerate, repossess or foreclose without giving the 30-day notice: (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period." App. L at L13-L14. The Board went on to note that the Quiller Contract did not in any event claim an "unqualified right to immediate acceleration, repossession and foreclosure without notice," those rights specifically being "subject to any notice of right to cure," concluding:

> Therefore, the contracts do not controvert the protections of the Act.

App. L at L14.

The Board then stated that the panel majority's "typical consumer" standard of contract construction

> would harm the goals of the Congress in adopting the Act. Preemption was plainly thought essential to assure the availability of financing to relatively low-income mobile home buyers. The penalties for usury are often severe. *The "average consumer" test would create great uncertainty among lenders. It would be impossible to know whether particular contract language might be considered too vague or inconsistent with the Act by a particular jury or trial court. Therefore, Borrowers' proposed standard, if adopted by this Court, could seriously reduce the availability of financing to low-income borrowers. This result would be particularly unfair because the Board's guidance to lenders has been that such contractual disclosures are not required.*

App. L at L15-L16 (emphasis added).

The Board felt that the notice requirement was simply in the nature of a condition precedent to the right to exercise default remedies,[8] and went on to say:

> Moreover, such a draconian result is not required to achieve Congress' other goal — providing certain protections to debtors under the Act. Regardless of contract language, a lender cannot qualify for usury pre-

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8. Georgia law contains a number of examples of analagous statutory conditions precedent. *E.g.*, O.C.G.A. § 44-14-162.2 (15-day notice required prior to a real property foreclosure sale); O.C.G.A. § 13-4-4 (where parties mutually disregard contract, reasonable notice required before original provisions of contract enforceable). Not giving the requisite notice does not, however, invalidate the contract, but simply invalidates the action taken (repossession, foreclosure, etc.) or subjects the wrongdoer to tort damages.

> emption it it does not *in fact* provide to borrowers the rights required by the Act.
>
> App. L at L15-16 (emphasis original).

The Board then stated:

> The regulation prescribes the *act* of giving notice and the form the notice must take. This is a significant right of debtors that must be observed for the federal usury preemption to continue to apply.
>
> . . . If, in fact, a court finds that the prescribed notice under section 501.4(h) was not provided to the debtor, then the creditor loses its federal preemption of the state usury law. The debtor then has available the full panoply of rights and remedies under the applicable usury statute.
>
> App. L at L16 (emphasis original) (footnote omitted).

The Board concluded:

> The Board's interpretations of its regulations, 12 C.F.R. § 590.4(d) and (h) are correct and in accord with Congressional intent concerning their applicability to the contracts at issue in these cases. The interpretations are not "demonstrably irrational" and are to be dispositive of the issues concerning whether the contracts qualify on their face for federal preemption under the Act. *The central issue for this Court to resolve is whether Borrowers have properly pleaded a failure by GECC or Barclays to in fact provide them the notices required by the Act and regulation.*
>
> App. L at L16-L17 (emphasis partially original, partially added).

The *en banc* dissenters agreed. *Quiller II*, slip op. 4799-4803, App. A at A2-A5 (Roney, J., dissenting).

C. The Federal Home Loan Bank Board's Position Was Not "Demonstrably Irrational" — *Milhollin* Requires Reversal.

The FHLBB is the agency designated by the Congress to promulgate the regulations specified in Section 501(c) of DIDMCA. DIDMCA § 501(d), App. G at G5. Furthermore, the FHLBB is "authorized to issue rules and regulations and to publish interpretations governing the implementation of [DIDMCA]." DIDMCA § 501(f), App. G at G6.

The position of the Board and of the dissenters is first that the Quiller Contract did not unequivocally give BarclaysAmerican a right which in all instances would result in conduct proscribed by DIDMCA and § 590.4(h) — thus, it did not violate the regulation and hence DIDMCA. They then argue that DIDMCA and the regulation regulate only the *act* of giving notice, and it is only a failure *in fact* to give that notice which results in loss of preemption.

This Court has often held that "an agency's interpretation of its own regulations is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see [*Milhollin, supra*, 444 U.S. at 566]; *United Staes v. Larionoff*, 431 U.S. 864, 872 (1977)." *Jean, et al. v. Nelson, Comm'r, et al*, 53 U.S.L.W. 4892, 4897 (U.S. June 25, 1985) (No. 84-5240). In 1980 this Court, in *Milhollin, supra*, dealt very specifically with the weight to be accorded the Federal Reserve Board's ["FRB"] interpretation of the consumer credit protection regulations, Regulation Z, 12 C.F.R. § 226.1 *et seq.*, it had promulgated under the Truth-In-Lending Act ["TILA"], 15 U.S.C. § 1601 *et seq.* In reaching the conclusion "that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff" interpreting Regulation 2, as expressed in an FRB staff memorandum, this Court formulated the following rule:

> *Unless demonstrably irrational,* Federal Reserve Board staff opinions construing the Act or Regulation *should be dispositive. . . .*

> *Milhollin, supra*, 444 U.S. at 565, 100 S. Ct. at 797 (emphasis added).

This was especially so where Congress had authorized the agency to interpret the regulations. *Id.* This Court admonished the courts that "*judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.*" *Id.* at 568, 100 S. Ct. at 798 (emphasis added). As regards consumer disclosures, the rationale for the rule is that

> [t]he concept of "meaningful disclosure" that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure. . . and the need to avoid. . . [informational overload.]" . . . And striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.
> 444 U.S. at 568-70, 100 S. Ct. at 798. (citations omitted)(footnote omitted)(emphasis original).

The foregoing observations of this Court apply without alteration to the instant case. Here, as there, the agency whose views are at issue is the agency appointed by Congress both to promulgate and to interpret the regulation under scrutiny. Here, as there, the agency has spoken unequivocally and has pronounced that Section 590.4(h) regulates only the acts of exercising default remedies without giving the required notice, and that nothing contained in the contract can violate the regulation. And here, as there, the Court of Appeals rejected the agency's interpretation of its own regulation. This Court reversed the Court of Appeals in *Milhollin*, and it should in this case because the Board's interpretation is not "demonstrably irrational."

Under § 590.4(h), there are four sets of circumstances under which default may occur: (1) abandonment; (2) other extreme circumstances; (3) where the debtor has been sent notice of default twice within the prior one-year period; and (4) all other situations. The majority's statement that the debtor's right to the 30-day notice is "absolute" is clearly erroneous. As the Board and its general counsel stated, only in the latter one of the four situations is the 30-day notice required. Thus, it is not "demonstrably irrational" to say, as did the Board (App. L at L14), that BarclaysAmerican's contractual right to immediate exercise of its default remedies did not necessarily violate the regulation, and that the right was in fact contractually qualified by the borrower's right to the 30-day notice.

Furthermore, a reading of § 590.4(h) reveals that the regulation requires only that the 30-day notice *actually be given* 30 days before any *action* is taken to accelerate, repossess or foreclose. Thus, the Board's interpretation of § 590.4(h) as regulating only the *act* of giving notice (App. L at L16), and not as regulating the contents of any contract, is similarly not "demonstrably irrational."

The transformation of § 590.4(h) into a "disclosure" regulation is the kind of "interstitial lawmaking" which *Milhollin* sought to discourage. The message of *Milhollin* was that the courts should not second-guess agency determinations in these situations. That message was lost upon the Eleventh Circuit majority, which paid lip-service to *Milhollin* and then reached a contrary result. This Court should retransmit the message loudly and clearly to avert a repetition of the TILA litigation of the '70s.[9]

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9. The *Milhollin* rule should apply with even greater force here. In *Milhollin*, the penalty sought was $1,000 plus attorneys' fees, as compared with the $94,000 sought only by the Quillers, let alone the class members. Furthermore, the TILA had a carefully thought-out remedial scheme with very limited recoveries, a one year statute of limitations and several exculpatory provisions, whereas under DIDMCA the recoveries are alleged to be virtually unlimited.

III. The Decision Below Is In Conflict With The Clear Language Of DIDMCA And 12 C.F.R. § 590.4(h) And Fails To Adhere To The General Rule, Followed In The Federal Courts, That A Contract Provision Authorizing Conduct Proscribed By A Statute Does Not Constitute A Violation Of The Statute Absent Action To Enforce The Provision.

A. 12 C.F.R. § 590.4(h) Regulates Only The Act Of Giving The 30-day Notice; Therefore, The Language Of The Quiller Contract Did Not Per Se Violate The Regulation.

DIDMCA § 501(c) conditions preemptive status upon compliance with the FHLBB regulations promulgated pursuant thereto. Since the advent of the "age of consumerism" in the sixties, *see generally Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973), state and federal statutes have imposed upon creditors many different requirements aimed at the protection of consumers. In general, such requirements may be divided into three broad categories: (1) "contract for" items which will not be enforced unless specifically agreed to in writing by the consumer; (2) "disclosure" items which must be disclosed to the consumer, either in the contract or on a separate disclosure statement; and (3) "conduct" or "action" items which simply require some action on the part of the creditor, irrespective of the terms of the contact. A review of the FHLBB's mobile home regulations, 12 C.F.R. § 590.4, shows that the FHLBB used all three approaches in the DIDMCA regulations. There are "contract for" requirements, 12 C.F.R. §§ 590.4(e)(3), (f)(1) & (g)(1), "disclosure" requirements, 12 C.F.R. § 590.4(d), and "action" or "conduct" requirements, 12 C.F.R § 590.4(c) & (h).

The majority in *Quiller I* seemed to agree that § 590.4(h) was a "conduct" regulation, quoting with approval the statement of the Board's general counsel to the effect that " '[§ 590.4(h)] refers only to the act of giving notice.' " A plain reading of the statute in light of the general counsel's statement leads to the following analysis:

(1) § 590.4(h) forbids *action* to accelerate, repossess or foreclose prior to creditor's *action* in giving timely and proper notice
(2) therefore, if creditor takes *action* to repossess or foreclose without giving proper notice
(3) regulation has been violated.

Viewed against that background, the fundamental error in the decision below becomes obvious from a reading of the preamble to the majority's second holding in *Quiller I*:

> . . . [I]f the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.
>
> *Quiller I*, 727 F.2d at 1071, App. B at B7.

That statement reflects an analysis of § 590.4(h) which results in a total non-sequitur and is wrong:

(1) § 590.4(h) forbids *action* to accelerate, repossess or foreclose prior to creditor's *action* in giving timely and proper notice
(2) therefore, if contract contains term *arguendo allowing action* to repossess or foreclose without giving proper notice
(3) regulation has been violated even if creditor has not acted in manner prohibited by regulation.

Since the regulation does not forbid a contract term allowing the proscribed *conduct*, such a contract term cannot possibly "violate" the regulation. To "create" such a "violation" constitutes the kind of "interstitial lawmaking" forbidden by *Milhollin*. As the FHLBB said in its second *amicus* brief, the only real issue "is whether [there has been] a failure by GECC or Barclays to *in fact* provide [the Quillers] the notices required by the Act and regulation." App. L at L17 (emphasis original). As only a violation of the *regulation* could result in loss of preemption, the Quiller Contract retains its preempt status, and as the complaint did not plead any actual attempts at acceleration, repossession

or foreclosure without giving the required notice, the trial judge correctly dismissed the complaint. F.R.C.P. 12(b)(6).

B. A Contractual Provision Authorizing A Statutorily Prohibited Act Does Not In And Of Itself Violate The Statute Absent A Statutory Proscription Against The Contract Provision Itself.

The majority did not cite a single case, either federal or state, in which a contract provision which, if enforced according to its terms, would result in conduct violative of a statute or regulation was held to violate a statute or regulation that regulated only conduct. In fact, the general rule, and that applied by the federal courts, is that, in such an instance, the offending clause is simply not enforceable, but the court will enforce the remainder of the contract as written.[10] For example, in *Vineberg v. Brunswick Corp.*, 391 F.2d 184 (5th Cir. 1968), cited by Judge Roney in his dissent in *Quiller II*, the defendants were sued on two identical notes which contained confession of judgment clauses which were void under Fla. Stat. § 55.05, defended on the ground that the cognovit clauses rendered the notes void in their entirety, even absent any attempt to enforce the clauses. The Fifth Circuit held that the cognovit clauses themselves were void but severable because of

> the well known principle of contract law that an illegal contract provision, or one contrary to public policy,

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10. Georgia law is the same. *Porter v. Midland-Guardian Co.*, 145 Ga. App. 262, 243 S.E.2d 595, *rev'd on other grounds*, 242 Ga. 1, 247 S.E.2d 743 (1978) (acceleration clause which, if enforced, would result in charging of excess rates does not violate a consumer finance statute that merely forbids charging excess rates, unless the creditor enforces the invalid provision); *Lowe v. Termplan, Inc.*, 144 Ga. App. 671, 242 S.E.2d 268 (1978) (invalid contract clause waiving right to notice of collateral sale does not invalidate the contract in absence of enforcement of the invalid clause). *But cf. Lawrimore v. Sun Finance Co.*, 131 Ga. App. 96, 205 S.E.2d 110, *aff'd*, 232 Ga. 637, 208 S.E.2d 454 (1974) (acceleration clause which, if enforced, would result in charging of excess rates violates statute that expressly forbids "contracting for" excess charges).

> when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless.

391 F.2d 186 (citations omitted).

Similarly, in *Seaboard Surety Co. v. Harbison*, 304 F.2d 247 (7th Cir. 1962), plaintiff surety company sued to enforce a series of indemnity agreements. Defendants pleaded the affirmative defense of "illegality" because each indemnity agreement contained a cognovit provision which was unlawful and unenforceable under Ind. Ann. Stat. § 2-2904 (Burns 1946). The Seventh Circuit struck the defense, finding the cognovit clauses themselves invalid, but not the remainder of the contract. *Id.*, 304 F.2d at 250.

This Court has followed the same approach in the antitrust context. One of the most-cited cases seems to be *Kelly v. Kosuga*, 358 U.S. 516, 79 S. Ct. 429 (1959), in which an onion grower was sued for the unpaid purchase price of onions he had purchased from respondent. The purchaser defended on the ground that his contract with respondent included a price fixing provision which violated the Sherman Act and voided the entire contract, including his promise to pay for the onions. This Court rejected that defense, stating that, "while the nondelivery agreement between the parties could not be enforced by a court," the lawful sale of the onions constituted "an intelligible economic transaction in itself" which the Court would "give . . . effect even though it furnished the occasion for a restrictive agreement of the sort here in question." *Id.*, 358 U.S. at 521, 79 S. Ct. at 432. The *Kosuga* approach has been applied by this Court many times, as shown by the numerous cases cited in *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1059 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105, 103 S. Ct. 729.

In the instant case, there has been alleged no effort on the part of BarclaysAmerican to enforce the provision of the contract which allegedly violates § 590.4(h). Under this Court's ruling in *Kosuga* and the other authorities referred to above, the remainder of the contract would remain en-

forceable under DIDMCA until such an attempt occurred, and the trial judge correctly dismissed the complaint.

C. The Dissenters' Approach — Simply Invalidating The Contract Provision — Best Effectuates The Congressional Purpose Of DIDMCA While Affording The Consumers The Protections To Which They Are Entitled.

The rule espoused by the dissenters is succinctly summed up by Judge Roney's statement in his first dissent in *Quiller I* that

> [r]ather than applying state usery [sic] laws to a contract which could not have been validly made thereunder, it would be more equitable to simply invalidate this contract clause to the extent it violates the consumer regulations, and enjoin enforcement if that remedy is deemed necessary to protect the consumer.
>
> *Quiller I*, 727 F.2d at 1072, App. B at B10 (Roney, J., dissenting).

Judge Roney expanded upon that theme in his *en banc* dissent, relying on the severability rule in *Vineberg*, *supra*, quoted in the preceeding section, and stating:

> The provisions of the contract held to be contrary to federal regulations certainly could be severed from the contract before us without rendering it meaningless. . . .
>
> *Quiller II*, slip op. at 4802, App. A at A6-A7.

That approach would afford consumers the protections contemplated by DIDMCA. It would also further the main purpose of Congress in enacting DIDMCA, which Judge Hill described in his dissent in *Quiller II* as follows:

> In passing the preemption act, Congress constructively undertook to ease the severity of the mortgage credit crunch and insure the availability of mortgage credit in states [with artificially low statutory interest levels]. (*citation omitted*) Although Congress concluded that purchasers of financing for premanufactured homes

> were entitled to additional consumer protections in order for their mortgages to fall within the preemption act, there is no doubt that the overriding objective of the act was to assist both borrowers and lenders by freeing up additional credit for housing. This was not intended to be a consumer protection disclosure act.

Id., slip op. at 4803, App. A at A8 (Hill, J., dissenting).

As proper and timely notice in accordance with § 590.4(h) would, irrespective of the terms of any contract, be a condition precedent to acceleration, repossession or foreclosure,

> [a] borrower can be adequately protected from actual violations of the act when and if they occur, at which time a counter-claim along the lines of the present action might be entertained.[11]

Id., App. A at A9.

It is totally unnecessary, either in terms of consumer protection or in terms of achieving the "overriding [congressional] objective" of DIDMCA, to subject creditors to the enormous penalties threatened by this lawsuit and others of its ilk. The clear requirements of DIDMCA and § 590.4(h), together with the ability of the state and federal courts to afford relief for *actual* violations, will protect consumers while insuring the continued steady flow of private venture capital into the mobile home financing sector.

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11. The Georgia courts have allowed recovery in tort for wrongful foreclosure and wrongful repossession. *Curl v. First Federal Savings and Loan Association of Gainesville*, 243 Ga. 842, 257 S.E.2d 264 (1979)(foreclosure); *Ford Motor Credit Co. v. Hunt*, 141 Ga. App. 612, 234 S.E.2d 112 (1977)(repossession).

IV. The Decision Below Brings Into Question The Preempt Status Of Every DIDMCA Mobile Home Contract Entered Into Since March 31, 1980, And Subjects Creditors To Billions Of Dollars Of Potential Liability For State Law Penalties Not Contemplated At The Time Of Contracting.

A. The Confusion Created By *Grant II*, *Quiller I* And The "Typical Consumer" Rule Of Disclosure/Construction.

Virtually every retail installment contract written in recent decades contains an acceleration clause and many, if not most, refer in some way to the creditor's rights upon default to repossess or foreclose. Immediacy is the very essence of acceleration, as has traditionally been the lack of necessity for notice and demand, since a creditor who has not received timely repayment needs to take immediate steps to protect itself. Similarily, U.C.C. § 9-503 allows repossession without "breach of the peace" and poses no notice or demand requirements. That is particularly important where the collateral is mobile and the giving of notice might actually act to defeat the right asserted.

Traditionally, acceleration and repossession provisions have not been drafted for the understanding of the "typical consumer." In fact, in a 1977 consumer credit survey conducted by the Federal Reserve Board, acceleration did not even make the list of the seventeen most important credit items in the eyes of consumers. 1978 FRB Report To Congress On Truth-In-Lending at 24. The Board has stated in this case, and the first part of *Quiller I* held, that § 590.4(h) does not require disclosure of the debtor's right to notice prior to acceleration or repossession. Why, then, require that acceleration or repossession clauses be drafted in such a way that the "typical consumer" will understand completely his or her complicated right to a 30-day notice? The mobile home consumer already gets the disclosures required by the TILA and Regulation Z and the Federal Trade Commission Holder in Due Course disclosure, 16 C.F.R. § 433.2(a), in addition to a considerable number of disclo-

sures mandated by state law. *E.g.*, GMVSFA, O.C.G.A. § 10-1-32. Presumably the FHLBB was aware of the amount of information presented to mobile home consumers and simply made an informed decision not to require disclosures regarding acceleration and repossession in order to avoid the type of "informational overload" referred to by this Court in *Milhollin*.

And what will be a sufficient "disclosure" under *Quiller I* and *Grant II*? The traditional acceleration clause has read something like this:

> Upon default by the purchaser, seller shall have the right, without notice or demand, to declare immediately due and payable all installments remaining due hereunder, giving such rebates as are required by law.

Now, however, in order to comply with *Quiller I* and *Grant II* and still retain its rights of acceleration and repossession, a creditor presumably would have to rephrase its acceleration clause somewhat as follows:

> Upon default by the purchaser, seller shall have the right to declare all installments remaining unpaid due and payable 30 days after it sends to the purchaser a notice of default and right to cure in the form set forth in 12 C.F.R. § 590.4(h)(2), unless the purchaser has abandoned the mobile home, or unless there is some other extreme circumstance, or unless purchaser has been sent such a notice two other times within the preceeding one year period.

When are the limits of "informational overload" reached? If "disclosure" is important, query whether or not consumers will get any more out of this acceleration clause than out of the more traditional one? The sentence is long and complex. What does "abandoned" mean? What is "some other extreme circumstance"? What is the form of the notice set forth in § 590.4(h) — must the entire form of the notice be set forth in full in the contract?

The Board did not require such disclosure and DIDMCA contracts entered into since March 31, 1980, will, as a mat-

ter of fact, not have been drafted with the "typical consumer" in mind. Nonetheless, all of those contracts will, under *Quiller I* and *Grant II*, have to be examined on a case-by-case basis and all of those which are in the traditional form will surely fail the test. Can anyone really say that either DIDMCA or § 590.4(h) gave even the most prudent creditor notice, five years ago, that this would be the result?

Perhaps even more important, what guidance do creditors have to assist them in compliance? *Quiller I* rejected the FHLBB's views on compliance with § 590.4(h) but substituted no practical guidance of its own. Other circuit courts and all state courts faced with this issue will now be forced to choose between the Eleventh Circuit's approach and that of the Board. It was exactly this dilemma which *Milhollin* sought to resolve, and this Court should do so now.

B. The Potential Detrimental Consequences Of Loss Of Preemption.

1. To consumers.

The principal purpose of DIDMCA's mobile home provision was to infuse money back into the failing mobile home market and make this type of low-income housing once again available to consumers, not to provide a windfall to consumers who had never been harmed by any alleged hypertechnical contract violations. The cost of the litigation over these issues will ultimately be borne by the consumers in the form of higher rates, and this is more so than ever before because of the universal trend (of which DIDMCA is a part) to deregulate financing rates. An even more important consequence of turning DIDMCA and its regulations into another TILA and Regulation Z will simply be, as noted by the Board in its second *amicus* brief, to cut down the flow of money to the mobile home market, which will be accompanied by a raising of credit-granting standards resulting in adverse credit decisions for those at the lower end of the credit-worthiness spectrum — typically those in the

most need of this type of housing. The irony of the situation is that this will be exactly the opposite of the principal objective Congress hoped to achieve in enacting this "carefully conceived financing program established to meet the needs of *both* parties in a time of rising cost of money." *Quiller I*, 727 F.2d at 1072, App. B at B10 (Roney, J., dissenting) *Cf.*, *Quiller II*, slip op. at 4803, App. A at A-9 (Hill, J., dissenting).

2. To creditors.

Creditors simply have not planned for and are not prepared for the consequences of the *Quiller I* decision. Many acceleration and repossession provisions, especially those expressed in the traditional form, will surely run afoul of *Quiller I* and, when that occurs, there will be a usury violation in a high percentage of the cases, since the very purpose of using DIDMCA in the first place was to be able to charge a rate greater than that allowed by state law. The monetary consequences to creditors will then be horrendous. Using *Quiller* as an example, the original credit extension was in the amount of $16,000, yet the Quillers seek $94,252.20 in forfeitures and penalties for themselves alone.

In North Carolina, where *Bass* and *Crow*, *supra* n. 6, are pending, the North Carolina Retail Installment Sales Act, N.C. Gen. Stat. § 25A-1 *et seq.*, provides penalties of forfeiture of the finance charge and affirmative recovery of twice the finance charge paid in cases analogous to *Quiller*. In addition, the consumers in those cases also allege that the rate violation "created" by the "*Quiller* violation" is also a violation of North Carolina's unfair trade practices laws, which would result in a further *trebling* of the damages awarded under the retail installment act. Applied to the Quiller Contract, that would result in the most extreme case in damages of $188,504.40. In the class action context, the potential damages in these situations are absolutely mind boggling. Surely the Congress never had that result in mind in enacting this statute, the primary purpose of which was to lure creditors back into the mobile home financing sec-

tor. This Court should put an end to this type of litigation now.

V. Conclusion

Under *Milhollin*, the FHLBB's view that 12 C.F.R. § 590.4(h) regulates only the act of giving the 30-day notice and does not attempt to regulate the contents of a mobile home sales contract with respect to that notice should have been accorded controlling weight by the Eleventh Circuit. The Board found that the language in the Quiller Contract did not violate § 590.4(h), but even if it did, the rule followed by other circuits which have considered the issue in analogous contexts is that the offending contract provision itself is simply invalidated, absent an actual attempt to enforce it. Finally, the decision below defeats the obvious intent of DIDMCA in imposing enormous unforeseen penalties upon unwary creditors and thereby lessening the flow of credit into, and raising the price of credit in, a sector of the housing market where credit is the *sine qua non* of the availability of housing. The issues in this case are of an importance far beyond this particular case, given the number of other cases presently pending involving the same issues and the strong likelihood that state and federal courts thoughout the country will be required to engage in *Quiller/Grant* analysis of mobile home contracts entered into under DIDMCA since 1980. These issues are now ripe for consideration by this Court and Petitioner respectfully requests that a Writ of Certiorari issue to review the July 8, 1985, opinion of the Eleventh Circuit.

Respectfully submitted,
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